Nos. 86-939, 86-941

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ETSI PIPELINE PROJECT,
Petitioner,
v.
STATE OF MISSOURI, *et al.*,
Respondents.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, *et al.*,
Petitioners,
v.
STATE OF MISSOURI, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF OF PETITIONER ETSI PIPELINE PROJECT

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ARGUMENT

This case asks whether the Secretary of the Interior (the "Secretary") has authority under Section 9 of the Flood Control Act of 1944 (the "1944 Act") to market unused irrigation storage at main stem reservoirs built by the Army Corps of Engineers (the "Corps") in the Missouri River Basin. The Secretary has determined that he has that authority. In its brief, ETSI Pipeline Project ("ETSI") showed that this determination accords with congressional intent, furthers the policies of the 1944 Act, was approved by Congress in Section 212 (b) of the Reclamation Reform Act of 1982 (the "1982 Act"), and is therefore eminently reasonable and entitled to deference.

Respondents challenge the Secretary's determination on four principal grounds. First, they contend that the Secretary erred by looking to Section 9 at all and should have been guided instead by Sections 6 and 8. They say Section 6 plainly grants the Corps authority over the unused irrigation storage; accordingly, Congress could not have elsewhere granted Interior concurrent jurisdiction or else the statute would produce hopeless conflict between the two agencies.

Next, respondents contradict their claim about the preclusive effect of Section 6 and argue that Section 8 defines the circumstances in which the two agencies' concurrent jurisdiction does indeed exist. Respondents say those circumstances have not been met here because the authorizations required from the Corps and Congress under Section 8 have not been given.

Then, further contradicting their contention that the Corps has exclusive authority, respondents come at last to Section 9, the section that really matters. Although they acknowledge that Section 9 gives the Secretary authority to market unused irrigation storage at Corps dams, they contend he may do so only after completing the construction of irrigation "works." That, they say, is the unassailable meaning of Section 9's reference to "reclamation . . . developments to be undertaken by the Secretary of the Interior under [the Pick-Sloan Plan]." Respondents add that any doubt about the "works" requirement was removed by Section 212(a) of the 1982 Act.

Finally, respondents assume that their previous contentions are correct and argue that the Secretary is entitled to no deference because he is not empowered to administer Section 9 at all, because his view is plainly contradicted by Sections 6, 8, and 212, and because his view has wavered and been at odds with that of the Corps.

ETSI demonstrates in this reply that respondents' contentions are not correct and that the Secretary's determi-

nation that he had authority to contract with ETSI should stand.

I. Section 6 of the Flood Control Act Does Not Preclude Interior's Authority to Market Water at Oahe.

The linchpin of respondents' entire argument is Section 6. They assert that it plainly grants the Corps marketing authority over unused irrigation water stored in Corps-built reservoirs in the Missouri Basin, necessarily leaving no such authority to Interior. There are two answers to this contention. First, it is not at all clear that the Corps' "surplus water" authority under Section 6 includes unused irrigation storage. Second, and more importantly, even if the Corps has authority over that storage, nothing whatsoever in Section 6 or its legislative history indicates that such authority is to be exclusive.

Until the District Court barred Interior from contracting for the beneficial use of excess irrigation storage, the Corps had concluded that it could not exercise its Section 6 marketing authority over such storage because it did not constitute "surplus" water. J.A. 209-210.[1] No doubt influenced by the District Court's decision that Interior likewise lacks authority over the storage—a decision which effectively rendered vast volumes of water unavailable for *any* beneficial consumptive use—the General Counsel of the Army in the midst of this litigation reinterpreted Section 6 to "empower the Secretary of the Army to make reasonable reallocations between the different project purposes," including from irrigation to

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[1] The following abbreviations are used in this brief: "ETSI Br." refers to the Brief on the Merits of ETSI Pipeline Project; "ETSI App." refers to the Appendix to that brief; "Pet. App." refers to the Appendix to ETSI's Petition for Certiorari; "Ry Br." refers to the Opposition Brief of Respondents Kansas City Southern Railway, *et al.*; "Ry App." refers to the Appendix to that brief; "States Br." refers to the Opposition Brief of Respondents the State of Missouri, *et al.*; "J.A." refers to the Joint Appendix filed in conjunction with the briefs on the merits in this case; "A.R." refers to the Administrative Record filed with the district court.

municipal use, and to contract for the use of that water. Ry App. 14a-15a.

It is not at all clear that the Corps' new interpretation is correct or that it would survive judicial scrutiny.[2] Indeed, while respondents now ask this Court to invalidate Interior's action on the ground that only the Corps could lawfully contract with ETSI,[3] in their Complaints they assert that there is *no* surplus water at Oahe and that the ETSI contract is thus invalid not only under Section 9 but under Section 6 as well.[4]

More importantly, even if the Corps' new view of *its* authority over irrigation storage were upheld, nothing in Army General Counsel's opinion, or in Section 6, or in the legislative history of Section 6 even remotely suggests that *Interior* is ousted of *its* authority over the water. Indeed, the legislative history cited by respondents demonstrates, if anything, that Congress intended that *neither* agency have exclusive jurisdiction.

Thus, respondents first stress the Senate Committee's failure to adopt an amendment to Section 6 proposed by

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[2] Significantly, Army Counsel noted that the authority should be exercised in accordance with the provisions of the reclamation law which, on their face, apply only to Interior. Ry App. 15a (citing 43 U.S.C. § 485h(c)). The Assistant Secretary of the Army also cautioned that this newly-discovered authority should be exercised sparingly. *Id.* at 16a-17a.

[3] It would be particularly ironic if, based on the new Army Counsel opinion, ETSI were now told that it should have contracted with the Corps. ETSI in fact first applied to the Corps for a water service contract. A.R. 930,330. While the Corps acknowledged that there was water available for industrial use at Oahe, A.R. 930,331, it never acted on ETSI's application—apparently because of its interpretation of the limits on its authority under Section 6. *See* J.A. 133. Because Interior's marketing authority is not limited to "surplus water" as defined by the Corps, when the Corps failed to act, ETSI turned to Interior for its contract.

[4] Railway Third Amended Complaint ¶¶ 78, 101; States Amended Complaint ¶ 85. *See also* States Opposition to ETSI Petition for Certiorari at 8 n.5 (noting opposition to the proposed redefinition of surplus water).

Secretary Ickes that would have given *Interior* exclusive control over water marketing authority at any Corps-built reservoir utilized for irrigation purposes.[5] *See* Ry Br. at 37; States Br. at 19-20. This failure, however, simply confirms Congress' determination to balance the power of the two agencies in furtherance of its vision of shared authority and cooperation in the Missouri Basin.[6]

Second, respondents rely on the House's rejection of an amendment to Section 6 which would have provided that, at any reservoir west of the 97th meridian, "the right to the use of waters for [domestic and industrial] purposes shall be established . . . pursuant to the provisions of the Federal Reclamation laws." 90 Cong. Rec. 4197 (1944). This amendment, however, was directed not at Interior's authority but rather at the preservation of a well-established principle under the reclamation laws—that state law should govern the acquisition of water rights at federal reservoirs in the arid Western states.[7] Opposition to the amendment likewise did not

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[5] ETSI has previously shown that the Secretary himself abandoned the proposal after Senator Overton reminded him of another provision in the pending Rivers and Harbors bill (apparently very similar to what was adopted as Section 8) designed to address the Secretary's concerns. ETSI Br. at 42-44. Respondents purport to discredit this analysis. *See* Ry Br. at 37 n.41 (citing 90 Cong. Rec. 8675 (1944)). ETSI is at a loss to understand their criticism, however, because the authority they cite has nothing to do with the point in question.

[6] Indeed, just as Congress rejected the proposal to give Interior such authority at Corps-built reservoirs, it likewise rejected amendments to Section 6 that would have increased Corps authority at the expense of Interior. *E.g.*, 90 Cong. Rec. 8548-50 (1944) (rejecting an amendment that would have permitted the Corps to market water for all purposes including irrigation at reservoirs it operates).

[7] As Representative Robinson, the amendment's sponsor, explained: "As [Section 6] now stands, the exercise of authority under it, if unchallenged, will amount to an assertion by the Federal Government of a claim of ownership to water for domestic and industrial purposes, without regard to local law." 90 Cong. Rec. 4197 (1944).

focus on Interior. Representative Whittington pointed out that Section 6 was designed to give the Corps marketing authority for the first time, principally at reservoirs where there was no intended irrigation function at all. *Id.* Thus, he explained, the amendment was "utterly inapplicable" because Section 6 "in no way involves reclamation." *Id.* That view prevailed.[8]

Respondents' contention that Section 6 must be read to give the Corps exclusive jurisdiction over irrigation storage is not only unsupported by the language and legislative history of that section; it is also based on a fundamental misperception about the entire Flood Control Act. As ETSI has previously shown, the concept of cooperative jurisdiction permeates the entire 1944 Act and the Pick-Sloan Plan for the Missouri Basin in particular. Indeed, the overriding premise of the Act and the Plan was that the Corps and Interior would share responsibility for development of major multiple-purpose federal water projects.[9]

Unable otherwise to show that Congress intended that the Corps have exclusive industrial water marketing authority at Missouri River main stem reservoirs, respondents rest on their unsupported speculation that coordi-

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[8] As with the proposed Senate amendment, there was no suggestion that Congress thereby intended to take away Interior's established marketing authority over water stored for irrigation. Rather, it suggests that Congress did not intend "surplus water" to include unused irrigation storage.

[9] The concept of shared jurisdiction and cooperative development was reflected in the very structure of the 1944 Act. *Compare* § 1(a) *with* § 1(c); § 9(b) *with* § 9(c); § 9(d) *with* § 9(e); § 6 of the 1944 Act *with* § 9(c) of the 1939 Reclamation Act (incorporated under §§ 8 and 9 of the 1944 Act). It was also plainly articulated in the Pick-Sloan documents approved in the Act. *E.g.*, S. Doc. No. 247, 78th Cong., 2d Sess. 3 (1944), ETSI App. 98a; S. Doc. No. 191, 78th Cong., 2d Sess. 11 (1944), ETSI App. 68a; H.R. Doc. No. 475, 78th Cong., 2d Sess. 3-4 (1944), ETSI App. 7a-8a. *See also* ETSI Br. at 11-19.

nate jurisdiction at the multiple-purpose reservoirs would give rise to agency conflict and administrative chaos.[10] The Court might properly weigh this concern if it were being voiced by Interior or the Corps, or if the implementation of the Act demonstrated any conflict. In fact, neither agency makes any such claim, and the record shows a long and successful history of interagency cooperation at the multiple-purpose projects.

Thus, in furtherance of the 1975 Memorandum of Understanding ("MOU") for a joint industrial water marketing program, Interior and the Corps mutually determined the volume of irrigation water that could be made available for industrial water use. ETSI App. 114a-116a. Since the MOU expired, Interior has continued to consult with the Corps about proposed contracts, and it requires water users to obtain a permit from the Corps for the withdrawal of water from any Corps-operated reservoir, J.A. 227-28, as ETSI did. A.R. 930,314. Even the March 1986 Army General Counsel's opinion emphasizes the continuing need for cooperation and coordination between Interior and the Corps in any water marketing program. Ry App. 15a.

Moreover, at least twice since the issue of industrial water marketing arose, both agencies have advised Congress that they view Interior's marketing of water at Corps-built reservoirs under Section 9 as entirely workable. *See* ETSI App. 105a-123a; 128 Cong. Rec. 16614 (1982). Indeed, when the 1982 Act was pending, the

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[10] The favorite platitude of respondents seems to be a quote from Senator Overton that "[s]omeone must have control of a dam." *See* Ry Br. at 4 n.8; States Br. at 32 (quoting 90 Cong. Rec. 8315 (1944)). He also said, however, "[w]here a dam is predominantly for flood control, it ought to be constructed by the Army engineers and be under their control, *and then the surface storage required for irrigation* and the use of water for irrigation *is under the control of the Bureau of Reclamation.*" *Flood Control: Hearings on H.R. 4485 Before a Subcomm. of the Senate Comm. on Commerce*, 78th Cong., 2d Sess. 262 (1944) (emphasis added). Thus, he fully supported concurrent jurisdiction at these reservoirs.

Corps opposed any change in the system of shared jurisdiction, 128 Cong. Rec. 16614 (1982),[11] and Interior concurred. *Id.* In the face of this record of successful cooperation, it is highly presumptuous for respondents—or the courts—to tell the two agencies that Congress' plan for concurrent jurisdiction cannot work.[12]

II. Section 8 of the Flood Control Act Does Not Preclude Interior's Contract with ETSI.

Respondents assert that, under Section 8, Interior has no jurisdiction at Corps-built reservoirs until it obtains

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[11] Acknowledging that the issue had caused confusion in the past, the Assistant Secretary of the Army explained that a provision which was intended to preserve and confirm Interior's existing authority (and which was ultimately enacted as Section 212(b) of the 1982 Act, 43 U.S.C. § 390*ll*(b) (1982)), was all that was required to clarify Interior's water marketing authority at Corps reservoirs:

> [Section 212(b)] define[s] and preserve[s] the repayment requirements intended by Congress for irrigation storage at Corps' projects. No additional definitions or provisions for such requirements are, therefore, necessary and might only serve to foster further confusion.
>
> *The Department of the Interior has informed us that it is continuing its efforts to identify customers for water stored for irrigation purposes at Corps' projects* and will be expanding its marketing of such water as demand develops . . . . *No legislative enactment is, therefore, necessary or advisable to expedite this effort.*

128 Cong. Rec. 16614 (1982) (emphasis added).

[12] Respondents argue that, if Interior were deemed to have marketing authority over the irrigation storage, this would subvert Congress' intention that such marketing should occur only where the Corps determines that (under Section 6) existing lawful uses of the water would not be adversely affected. Respondents point out that, under Section 9 and the reclamation laws, Interior need only decide that the marketing will not impair a reservoir's irrigation uses. Respondents' argument ignores the fact that the Corps and Interior have already *jointly* determined that the water could be made available for industrial use. J.A. 136. More importantly, the ETSI contract expressly states that it was entered into only after the Secretary had consulted with the Secretary of the Army and concluded that the contract would not adversely affect existing uses of water. J.A. 226.

the approval of Congress and the Corps to construct "additional works . . . for irrigation." Ry Br. at 18-19; States Br. at 22-29. But the language, history, and purpose of Section 8 all make clear that it was not intended to apply to the projects already approved by the Corps and the Congress through Section 9. After detailed study and analysis by Interior, the Sloan Report proposed the construction of Oahe with storage for irrigation; in S. Doc. No. 247, the Corps agreed to that plan. Thereafter, Congress approved the plan in Section 9(c) and in Sections 9(d) and 9(e) authorized appropriations for "the works to be undertaken under said plan by the Secretary of the Interior."

If Section 8's requirements applied to Oahe, as respondents contend, these authorizations and approvals in Section 9 would be for naught; they would all have to be repeated before the Secretary could exercise his Section 9 authority. Congress cannot have intended such a result. Rather, the only reasonable construction of the statute is that the approvals and authorizations in Section 9 meet the otherwise redundant requirements of Section 8. This construction is confirmed by both the language and the legislative history of Section 8.

As passed by Congress in 1944, Section 8 applies "[*h*]*ereafter*, whenever the Secretary of War determines, upon recommendation by the Secretary of the Interior that any dam and reservoir project operated under the direction of the Secretary of War may be utilized for irrigation purposes . . . ." Despite respondents' contrary claims, the word "hereafter" underscores that Section 8 applies only to Corps projects for which an irrigation function is subsequently authorized, and not to projects for which the 1944 Act itself authorized such a function. This meaning is clear from reference to other sections in the statute: "hereafter" in Section 8 contrasts with "not heretofore or herein" found in Section 1. Indeed, Section 1(b) originally referred to works "hereafter" as well as "herein authorized for construction." The word "hereafter" was deleted "so that it

would apply only to projects which are authorized in the bill." 90 Cong. Rec. 8670 (1944) (statement of Senator O'Mahoney); *see also id.* at 8555-56. By implication, therefore, Section 8 applies to projects *not* authorized in the bill.[13]

The legislative history likewise confirms that Section 9 was intended to replace Section 8 at the multiple-purpose projects authorized in the Pick-Sloan Plan. Section 9 was inserted *after* Section 8 was complete.[14] Thus, knowing all the terms of Section 8, Congress expressly formulated Section 9—incorporating and fulfilling the purposes of Section 8—to cover the Missouri Basin projects only. This action demonstrates that Congress meant for Interior to proceed directly under Section 9 with the Missouri Basin projects described therein, without delaying his actions to comply with the repetitious dictates of Section 8.

III. Section 9 of the Flood Control Act and the Pick-Sloan Documents Incorporated Therein Gave Interior the Authority to Approve the ETSI Contract.

Section 9 is the only provision of the Flood Control Act that expressly and exclusively addresses Missouri Basin development. Respondents accuse ETSI of ignoring its "plain language" and elevating the Pick-Sloan Plan approved therein "to the level of enacted law." Ry

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[13] By contrast, Section 6, which otherwise grammatically resembles Section 8, lacks the word "hereafter," implying that the authorization in that section applies to Corps projects generally. While respondents cite Section 7 to cast doubt on this interpretation, Ry Br. at 30 n.31, the utter dissimilarity of the two sections renders a comparison meaningless.

[14] When the earlier versions of Section 8 were being considered, the Missouri Basin projects were listed in Section 10, along with all of the other projects authorized in the 1944 Act. *See, e.g.*, 90 Cong. Rec. 4205-06 (1944). Eight days after S. Doc. No. 247, which reconciled the Pick and Sloan Reports, was presented to the Senate, *with Section 8 already in its final form, see* 90 Cong. Rec. 8674-76 (1944), the Missouri Basin projects alone were deleted from the scores of other projects in Section 10 and put in a new Section 9, *id.* at 8676; *see also id.* at 9279.

Br. at 14, 21-28; States Br. at 29-34. The "plain language" ETSI is accused of ignoring is the undefined term "reclamation . . . developments to be undertaken by the Secretary" used in Section 9(c), which the Railway asserts can only mean irrigation works constructed and maintained by Interior, Ry Br. at 24-25, and which the States imply can only mean a reservoir controlled by Interior, States Br. at 32. While respondents thus differ concerning the meaning of this "plain language", they agree that it precludes Interior from exercising authority at Oahe. Yet once again, nothing in the language of the statute or its history supports their position.

The first difficulty with respondents' argument is created by the plain language of Section 9 they choose to overlook. Section 9(a) begins by approving the House and Senate Documents that comprise the Pick-Sloan Plan. Section 9(c) further emphasizes the importance of those documents by providing that, "[s]ubject to the basin-wide findings and recommendations regarding the benefits, the allocations of costs and repayments by water users, *made in said House and Senate documents*, the reclamation . . . developments to be undertaken by the Secretary of the Interior *under said plans* shall be governed by the Federal Reclamation laws . . . ." (Emphasis added). Thus, if Section 9 communicates anything plainly, it is that the Secretary should look first to the "comprehensive plans" adopted in Section 9(a) to determine the scope of his authority and responsibility.[15] And,

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[15] Contrary to respondents' assertions, *United States ex rel. Chapman* v. *Federal Power Commission*, 345 U.S. 153 (1953), fully supports this conclusion. *Chapman* makes clear that, while Congressional approval of a comprehensive plan for water resource development does not require the government to carry out every project precisely as described in the plan, the basic elements and policies of the plan are binding law. Here, the Secretary based his approval of the ETSI contract not on the fine details of the Pick-Sloan Plan but rather on the basic policies reflected therein and on the clearly stated project purposes. *See* ETSI Br. at 9-19. Nothing in *Chapman* supports respondents' claim that these elements of a plan approved by Congress may be ignored.

as ETSI has previously stressed, a fundamental policy of the comprehensive plans for Missouri Basin development is that "[a]ll irrigation features should be operated by the Bureau of Reclamation . . ." [16] and that "[i]n all reservoirs . . . utilization of storage for irrigation should be in accordance with regulations prescribed by the Secretary of the Interior." [17]

In light of this clear policy in the Pick-Sloan Plan, the Secretary had to determine whether the irrigation storage at Oahe was part of a "reclamation . . . development to be undertaken by the Secretary" in accordance with the reclamation laws. Contrary to respondents' claims, nothing in this language implies that the reclamation laws govern only *after* the construction of "works" is complete and a reclamation project fully operational. The most sensible reading of the language—and the one the Secretary adopted—is that the reclamation laws apply to all phases of the Secretary's assigned development projects, from conception to final repayment of the costs.[18]

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[16] The Railway contends that "features," like "developments," must mean "particular concrete works." Ry Br. at 24. A like argument was made and rejected in *Trinity County Public Utilities* v. *Harrington*, 781 F.2d 163 (9th Cir. 1986), where the court considered the applicability of the reclamation laws to a federal hydroelectric power project. The court held that not only actual dams but also power imported into the project area constituted "features" of that project for purposes of determining the rates that could be charged certain preference customers. Clearly, hydroelectric power can no more readily be deemed "concrete works" than the irrigation storage at issue in this case.

[17] S. Doc. No. 191, at 11, 8 (ETSI App. 68a, 63a); *accord* H.R. Doc. No. 475 at 3-4 (ETSI App. 7a-8a); *see also* S. Doc. No. 247 at 2 (ETSI App. 94a).

[18] Consistent with this interpretation of Section 9, the reclamation laws specifically provide that repayment obligations for industrial water use accrue, not from the time irrigation works are completed, but "from the year in which water is first delivered for the use of the contracting party." 43 U.S.C. § 485h(c). While construction of the Oahe irrigation unit has been suspended, the construction costs already incurred for the irrigation storage, *see* 128

IV. The Reclamation Reform Act of 1982 Expressly Preserves Interior's Contracting Authority at Corps-Built Reservoirs.

With remarkable bravado, respondents characterize legislation passed in 1982 as "the legislative *coup de grace* to the petitioners' theory that the reclamation laws apply to Oahe." Ry Br. at 41-42; States Br. at 23-24. It is, more accurately, the *piece de resistance* of that theory.

Respondents rely in particular on Section 212(a) of the 1982 Act, which they say deprives Interior of *any* authority at Corps reservoirs unless the reservoir is expressly designated a reclamation project or includes "irrigation works." Ry Br. at 42. The section simply does not say that. Section 212(a) relates exclusively to *"lands* receiving benefits from Federal water resources projects constructed by the [Corps]." (Emphasis added). It was designed to free land irrigated through privately-built works at Corps reservoirs from the acreage restrictions of the reclamation laws. 43 U.S.C. § 390*ll*(a) (1982).[19] This case has nothing to do with such acreage restrictions or with "lands receiving benefits from Federal water resources projects."

Section 212(b), however, does concern this case and speaks directly to the question of Interior's contracting authority. Although respondents would like to ignore it, that section's provisions were expressly intended to preserve Interior's authority to contract for the use and repayment of irrigation storage at Corps-built reservoirs. Prior to passage, the section was the subject of intense scrutiny and debate because some Senators were concerned that it might undercut the future ability of In-

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Cong. Rec. 16609 (1982) (Table I), await repayment pursuant to the reclamation laws. The ETSI contract was part of Interior's entirely legitimate effort to begin recouping those costs.

[19] *Compare* Section 212(a) of the 1982 Act *with* 41 Op. Att'y Gen. 377 (1958) *and United States* v. *Tulare Lake Canal Co.*, 535 F.2d 1093 (9th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977). *See also* S. Rep. No. 373, 97th Cong., 2d Sess. 10 (1982).

terior to obtain repayment under the reclamation laws for the use of irrigation storage at Corps reservoirs. *See* ETSI Br. at 26-27. To meet those concerns, the Senate Committee "specifically amended the original version of S. 1867 to insure that the Secretary's authority to contract with water users in order to recover costs *is maintained.*" 128 Cong. Rec. 16612 (1982) (emphasis added).[20]

Respondents claim that Congress believed Section 212(b) applied only to agricultural water users. *See* Ry Br. at 42 n.47. This is not credible for two reasons. The statute expressly reaches all "water users" who contract with Interior. Moreover, Congress was specifically informed that repayment under the reclamation laws for irrigation storage at particular Corps projects, including Oahe, was being obtained in part from industrial water users.[21] Respondents are thus clearly wrong in asserting that Congress denied Interior the authority to contract and obtain repayment for the costs of irrigation storage at Lake Oahe. Section 212(b) provides that "contracts with the Secretary" which require "water users" to "repay . . . costs of a Corps of Engineers project . . . allocated to . . . irrigation storage *shall remain in effect.*" (Emphasis added). It is hard to imagine a clearer refutation of respondents' position or a stronger affirmation of the ETSI contract.

V. The Secretary's Interpretation of Section 9 Is Entitled to Deference.

The foregoing discussion plainly shows that the Secretary was fully justified in entering into a water service

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[20] The Corps and Interior likewise both advised Congress that they supported the adoption of Section 212(b) in order "to assure that the Secretary of the Interior's authority to contract with water users for irrigation water supplies from Corps of Engineers projects continues in effect and is not inhibited in any way." *Id.* at 16607; *see also id.* at 16609; ETSI Br. at 26-27.

[21] *See* 128 Cong. Rec. 16608-09 (1982) (inquiry from Senator Moynihan); *id.* at 16611 (response from Major General Heiberg of the Corps).

contract with ETSI pursuant to Section 9(c). Even if there were some room for doubt about the Secretary's interpretation, however, his interpretation is clearly a reasonable one and, thus, deserving of deference.

Respondents contend that the Secretary's construction of Section 9 deserves no deference because (1) Interior is not clearly empowered to administer the section; (2) Congress has plainly rejected Interior's interpretation through Sections 6 and 8; and (3) his interpretation has been unsure, inarticulate, inconsistent and challenged by Congress and Army. None of these contentions is true.

Respondents first contend that, unlike this Court's past deference cases where the statute "unequivocally empowers the agency offering the interpretation to administer the program in question," "the existence of that authority is precisely the question presented" here. Ry Br. at 45 n.50. Section 9, however, expressly directs the Secretary to undertake the "reclamation and power developments" described in the Pick-Sloan Plan in accordance with the federal reclamation laws.[22] Respondents may not agree with the Secretary's interpretation of Section 9's direction, but they cannot legitimately dispute his basic authority to construe (and administer) the section.[23]

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[22] *Compare United States* v. *Riverside Bayview Homes, Inc.*, 106 S. Ct. 455 (1985), where the Court deferred to the Corps' determination that its authority over "navigable waters" included wetlands adjacent to such waters, noting that it concerned "a problem of defining the bounds of [the agency's] regulatory authority." 106 S. Ct. at 462.

[23] The District Court attached great significance to the fact that, for certain purposes, the agencies designate storage in the Missouri Basin and elsewhere as "multiple-use" storage and that there is no storage at Oahe exclusively designated for irrigation. The Court mused, "one wonders how the Interior Department is to control what cannot be identified." Pet. App. 64a. This illustrates the problems courts encounter when they fail to defer to the expertise of the agencies Congress designated to administer a program. As the Corps and Interior explained to Congress in 1975, their determination of the volume of irrigation water avail-

Respondents next claim that, in both Sections 6 and 8, Congress "definitively" and "decisively" rejected the Secretary's interpretation of his authority. Ry Br. at 43-44; States Br. at 40-41. As shown, however, Section 6 addresses only the Corps' jurisdiction over "surplus water" at Corps-built reservoirs. It is disingenuous to suggest that this provision unambiguously covers unused irrigation storage at Oahe,[24] let alone that it rejects Interior's jurisdiction over such water. Likewise, it cannot fairly be said that Section 8 clearly required the Secretary to redo what Section 9 had already done.

Significantly, when respondents finally turn to the Secretary's interpretation of Section 9, they do not address his interpretation directly; instead, they fault him, first, for acknowledging doubts about his Section 9 authority when he entered into the MOU. Ry Br. at 44 n.48; States Br. at 42. But it is precisely where a statute is ambiguous that deference is appropriate, and there can be no doubt that one of the reasons the two Secretaries entered into the MOU was because of the statute's ambiguity.[25]

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able for interim industrial use began with the quantification of the expected uses authorized in the Pick-Sloan Plan. Total depletions were projected, including anticipated agricultural demand. Then, taking into account desirable stream flow levels, the Corps and Interior (working with the Missouri Basin States) determined that one million acre feet of irrigation water could be used for industrial use for a period of at least forty years. ETSI App. 114a-116a. The "joint storage" designation used in the day-to-day operation of reservoirs was entirely irrelevant to that analysis.

[24] As discussed, it was not until March 1986 that Army General Counsel *first* construed "surplus water" to include unused irrigation water. Prior to that time, the Corps' view had been that the Act is "ambiguous" and "water from the main stem reservoirs may not be marketed by the Secretary of the Army as 'surplus' water under Section 6 of the 1944 Act." J.A. 128, 135 n.*.

[25] The respective 1974 Opinions of the Interior Solicitor and the Acting Army General Counsel documented that the statute was not plain regarding the agencies' water marketing authority at the main stem reservoirs. J.A. 120-27, 128-35. Moreover, shortly after the two Secretaries signed the MOU, Army Secretary Calla-

Moreover, as shown above, even this ambiguity was resolved with the 1982 passage of Section 212(b).

Respondents then fault the Secretary's interpretation of his authority as being not "adequately articulated." Specifically, they claim that his decision to enter the ETSI contract was based solely on the 1974 Opinion of the Interior Solicitor, a "conclusory" opinion "clearly flawed" in that it did not discuss Sections 6 and 8. Ry Br. at 48; States Br. at 41-42. These points are not well taken. The ETSI contract and its accompanying staff memorandum rely on Section 9 of the 1944 Act and Section 9(c) of the 1939 Reclamation Act as authority for the contract. J.A. 212-17, 225-26.[26] The supporting memorandum discusses the MOU and the 1974 Solicitor's Opinion as well. The 1974 Opinion, in turn, examines the background, language, and legislative history of Section 9 and details the Solicitor's reasons for concluding that Interior has authority under the Act to market unused irrigation water at Corps-built reservoirs.[27] This discussion more than meets the requirement that the Secretary "explain the rationale" for his decision and pro-

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way wrote to Interior Secretary Morton, stating: "My greatest concern is that the statutes relating to marketing the water for industrial purposes are unclear." J.A. 142. Nevertheless, the two Secretaries agreed that the most reasonable construction of the "unclear" statutes was that the Secretary of the Interior could market the unused irrigation water. J.A. 136.

[26] The ETSI contract expressly makes the findings required by these two statutory provisions and by the MOU. J.A. 226. Respondents apparently believe that Interior's action should be declared *per se* unreasonable for its failure to also discuss Sections 6 and 8. Respondents cite no authority, however, requiring an agency to address matters that it deems immaterial to its decision. It would be particularly unfair to fault the Secretary for failing to address Section 6, since the Corps' view at the time was that no authority lay under that section to market unused irrigation water.

[27] Both the supporting memorandum to the Secretary (J.A. 212-23) and the Solicitor's legal opinion (J.A. 120-27) are entitled to deference along with the Secretary's own final decision. *See Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 n.9 (1980).

duce a record indicating the "path" by which he reached that decision.[28]

Respondents also contend that deference is not due because Interior's construction of Section 9 has been inconsistent. Ry Br. at 47-48.[29] In particular, they claim that previous positions taken by the Secretary, even as recently as 1975 and 1982, contradict the position he advances here. This is simply not true.[30] From his initial participation in the drafting of the Flood Control Act through his approval of the ETSI contract, the Secretary has never deviated from the view he takes here—that he has Section 9 authority to market unused irrigation water from the main stem reservoirs.[31] Further-

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[28] *See Bowen* v. *American Hospital Ass'n*, 106 S. Ct. 2101, 2113 (1986) (Stevens, J.); *Bowman Transportation, Inc.* v. *Arkansas-Best Freight Systems, Inc.*, 419 U.S. 281, 286 (1974).

[29] Respondents contradict themselves by charging that little deference should be given to Interior on the basis of alleged inconsistencies while also urging the Court to accord near-dispositive weight to the March 1986 Army General Counsel Opinion—an opinion that reversed the Corps' long-held view that unused irrigation water could *not* be marketed under Section 6.

[30] The only one of the four instances cited by respondents that is not distinguished or refuted by their own brief (Ry Br. 47 n.54) is a 1946 declaration by a Bureau Assistant Chief Counsel that the provisions of Section 9(c) of the Flood Control Act refer "exclusively to power developments undertaken by the Secretary of the Interior at dams he has been authorized to construct." This reference like others from the 1957 Hearings, pertained to *power* developments and Section 5, rather than to *reclamation* developments to which Section 5 is not applicable. In any event, a single 1946 view of an assistant counsel on a tangential point pales against the long-standing repeated position of the Secretary himself on the precise question now before the Court.

[31] It is particularly misleading for respondents to suggest that Interior's adoption of the MOU is inconsistent with his approval of the ETSI contract. In fact, his position in the MOU *supports* the position he takes here. In 1974, the Interior Solicitor determined that the Secretary is "clearly authorized" by Section 9 of the 1944 Act and Section 9(c) of the Reclamation Act "to make . . .

more, contrary to respondents' suggestions, the Secretary's interpretation has been specifically presented to and affirmed by Congress.[32] Finally, and perhaps most importantly, the Secretary's construction of the Act is a reasonable one that furthers the policies of the Act. For all these reasons, his construction should be affirmed by this Court.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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contracts" for the municipal and industrial use of water. J.A. 126. The MOU thereafter confirmed this view, stating that the "Secretary of Interior may, pursuant to applicable authorities, both *on his own behalf* and as agent for the Secretary of the Army, contract for the marketing of water for industrial uses . . . ." J.A. 136 (emphasis added).

[32] The fact that Congress knew the Secretary's interpretation and failed to change the law strongly supports the reasonableness of that interpretation. *See United States* v. *Riverside Bayview Homes, Inc.*, 106 S. Ct. at 464-65; *United States* v. *Rutherford*, 442 U.S. 544, 554 & n.10 (1979). Indeed, the validity of the Secretary's view is further underscored by Congress' clear endorsement of that view in Section 212(b). *See Lawrence County* v. *Ladd Deadwood School District No. 40-1*, 469 U.S. 256, 267-268 (1985).